

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG**

GARY L. SMITH,

Petitioner,

v.

**CIVIL ACTION NO. 3:06CV9
(BROADWATER)**

KEVIN J. WENDT,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day the above styled case came before the Court for consideration of the Report and Recommendation of Magistrate Judge James E. Seibert, dated April 25, 2006. Neither party filed any objections to the Report. After reviewing the above, the Court is of the opinion that the Magistrate Judge's Report and Recommendation (**Document 9 in 3:06CV9**) should be and is hereby **ORDERED** adopted.

The Court further **ORDERS**

- 1) petitioner's 28 U.S.C. § 2241 petition (**Document 1**) is now **DENIED WITHOUT PREJUDICE** so that petitioner may properly bring his claim under Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 399 (1971);
- 2) respondent's Motion to Dismiss, Or Alternatively, For Summary Judgment (**Document 6**) is now **GRANTED** without prejudice; and
- 3) the Clerk is **DIRECTED** to **STRIKE AND DISMISS** this matter from the Court's active docket.

The Clerk is directed to transmit true copies of this Order to the petitioner and all counsel of record herein.

DATED this 30TH day of June 2006


W. CRAIG BROADWATER
UNITED STATES DISTRICT JUDGE